Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Intercarrier Compensation for ISP-bound Traffic	)	CC Docket No. 99-68
Providers	)	

OPPOSITION OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AWS"), by its attorneys, hereby submits its opposition to the petitions for reconsideration of the Commission's *Order* in the above-captioned proceeding[1/] filed by the National Telephone Cooperative Association, Choctaw Telephone Company et al., and the Independent Alliance on Inter-Carrier Compensation (collectively the "Petitioners").[2/]

INTRODUCTION

In the *Order*, the Commission notes that while arbitrage opportunities are particularly manifest with respect to ISP-bound traffic, "any compensation regime based on carrier-to-carrier

---

[1/] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-bound Traffic Providers*, CC Docket No. 96-98, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001) ("*Order*").

[2/] Petition for Reconsideration of the National Telephone Cooperative Association (filed June 14, 2001) ("NTCA Petition"); Petition for Reconsideration of Choctaw Telephone Company et al. (filed June 14, 2001) ("Choctaw Petition"); Petition for Reconsideration and/or Clarification of Independent Alliance on Inter-Carrier Compensation (filed June 14, 2001) ("IAICC Petition") (collectively "Petitions").

payments may create similar market distortions."[3/] Accordingly, the Commission has commenced a rulemaking proceeding to consider all intercarrier compensation issues.[4/] In addition, as an interim measure, the *Order* establishes a temporary and voluntary recovery scheme for ISP calls. Specifically, during the *NPRM* comment period, the *Order* permits incumbent local exchange carriers ("ILECs") to avail themselves of a limitation on payments for ISP traffic, or, if they want, ILECs may continue to pay for such calls pursuant to state-approved reciprocal compensation rates.

If an ILEC opts into the Commission's new regime for ISP-bound calls, however, it must offer to exchange all traffic subject to Section 251(b)(5) of the Communications Act at the same rate. This "mirroring rule" reflects the Commission's correct determination that "[i]t would be unwise as a policy matter, and patently unfair, to allow incumbent LECs to benefit from reduced intercarrier compensation rates for ISP-bound traffic, with respect to which they are net payors, while permitting them to exchange traffic at state reciprocal compensation rates, which are much higher than the [ISP rate caps], when the traffic imbalance is reversed."[5/]

Contrary to the Petitioners' contention that the mirroring rule was unlawfully thrust upon them, *ILECs* have the choice of whether or not to adopt the ISP rates offered by the Commission

---

[3/] *Order* at ¶ 6.

[4/] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. Apr. 27, 2001) ("*NPRM*").

[5/] *Order* at ¶ 89.

and, therefore, *ILECs* control whether or not the mirroring rule is applicable to their Section 251(b)(5) traffic. Simply put, if ILECs want to take advantage of the interim benefit the Commission has granted them with regard to ISP rates, then ILECs must accept the reasonable conditions the Commission has imposed on the exercise of that benefit.

I. THE COMMISSION DID NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT

The Petitioners do not object to the interim ISP caps adopted in the *Order*. In fact, they commend the Commission for taking such action now instead of waiting for the conclusion of the *NPRM*. The Petitioners, however, complain about the Commission's mirroring rule, which requires ILECs to offer to exchange all Section 251(b)(5) traffic at the capped ISP rate if they elect to use the ISP payment regime adopted in the *Order*. Although the Commission was not legally compelled to offer the interim benefit to ILECs, and although ILECs are not legally compelled to take advantage of the interim benefit offered by the Commission, the Petitioners apparently believe that their right to do so should be unfettered by any obligations on their part.

The Petitioners allege that in implementing the "mirroring" provision, the Commission violated the notice requirements of the Administrative Procedure Act ("APA"), which require an agency engaged in rulemaking to publish a notice that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[6/] According to the Petitioners, the Commission's notice failed to indicate that its final rules might affect rates for traditional voice and data traffic in addition to ISP-bound traffic and, therefore, the mirroring rule was unlawfully promulgated.

6/ 5 U.S.C. § 553(b)(3).

There is no merit to this argument. Although the Commission's initial notice focused on the intercarrier compensation scheme for ISP-bound traffic, the decision to include voice and data traffic within the rate caps was a logical outgrowth of the decision to implement these rates for ISP-bound traffic. Thus, the notice set forth by the Commission was sufficient. In any event, the rate caps for Section 251(b)(5) traffic are entirely voluntary; an ILEC can avoid their application by choosing not to opt into the Commission's interim ISP rate regime. The establishment of a permissible, but not required, pricing scheme does not require notice and comment procedures under the APA.

Courts have acknowledged that agencies may promulgate final rules that differ from proposed regulations in order "to avoid the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary."[7/] In considering whether notice is adequate, courts look at the relationship between a proposed regulation and a final rule. Even when final rules differ from proposed rules, an agency is not required to re-notice if the changes "follow logically from" or "reasonably develop" the rules originally proposed.[8/]

Notwithstanding the Petitioners' contentions, the mirroring rule is as much a logical outgrowth of the proposals set forth in the *Public Notice*[9/] and the *1999 Reciprocal Compensation NPRM*[10/] as are the ISP rate caps adopted in the *Order*. In those documents, the

---

7/ *Shell Oil Co. v. EPA*, 950 F.2d 741, 750 (D.C. Cir. 1991).

8/ *Connecticut Light and Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 533 (D.C. Cir. 1982).

9/ *Public Notice*, Comment Sought On Remand Of The Commission's Reciprocal Compensation Declaratory Ruling By The U.S. Court of Appeals for the D.C. Circuit, CC Docket Nos. 96-98, 99-68 (rel. June 23, 1999).

10/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No.

Commission sought comment on issues related to intercarrier compensation arrangements for ISP-bound traffic in order to evaluate how this particular kind of traffic fits into the overall scheme of reciprocal compensation. For instance, in the *1999 Reciprocal Compensation NPRM*, the Commission tentatively concluded that parties should "hold a single set of negotiations regarding rates, terms, and conditions for interconnected traffic," including ISP-bound traffic, and should "submit all disputes regarding interconnected traffic to a single arbitrator."[11/] In addition, the Commission asked commenters to provide alternative proposals that would "advance the Commission's goals of ensuring the broadest possible entry of efficient new competitors, eliminating incentives for inefficient entry and irrational pricing schemes, and providing to consumers as rapidly as possible the benefits of competition and emerging technologies."[12/]

Although the Commission's focus in the two notices was on ISP-bound traffic, the agency plainly acknowledged the integral relationship between payment for termination of those calls and the existing reciprocal compensation regime. Indeed, many commenters argued that a change in the rates for the transport and termination of ISP-bound calls must necessarily affect the rates for the transport and termination of local traffic because there are no inherent differences in the costs of delivering a voice call to a local end user and a data call to an ISP.[13/] Thus, the *Order's* determination that ILECs may only take advantage of the interim ISP rate caps if they offer lower rates for Section 251(b)(5) traffic can hardly be said to have come out of the

---

96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) ("*1999 Reciprocal Compensation NPRM*").

[11/] *Id*. at ¶ 29.

[12/] *Id*. at ¶ 33.

[13/] *Order* at ¶¶ 90-93, nn.180-182.

blue. Precluding ILECs from picking and choosing intercarrier compensation regimes based on the nature of the traffic exchanged flows logically from the Commission's expressed desire to promote competition and discourage irrational pricing schemes.

Moreover, even if the Commission's notice were deemed inadequate for purposes of adopting a binding rule, ILECs are not bound by the mirroring rule. In fact, the mirroring rule only takes effect if an ILEC affirmatively chooses to opt into the ISP rate regime on a state-by-state basis. If an ILEC is concerned about the effect of the mirroring rule on its operations, it can maintain the status quo and file comments expressing its views in the *NPRM* proceeding. The *Order* does not affect ILECs' rights or obligations. Rather, the *Order* simply gives ILECs the opportunity to accept an interim benefit and accompanying conditions. As such, prior notice of the mirroring rule was unnecessary.[14/]

II. THE COMMISSION SHOULD RETAIN THE MIRRORING RULE

Contrary to the Petitioners' claims, the mirroring rule is an appropriate way to ensure rationality in the reciprocal compensation framework pending a Commission decision on overall intercarrier compensation reform. As the Commission acknowledges, without such a condition, ILECs could substantially reduce the amount they have to pay to other carriers while continuing to use higher rates when it inures to their benefit.[15/] While the Petitioners are quick to complain about the "regulatory arbitrage and economic distortions" caused by ILEC payments for ISP connections,[16/] they ignore the fact that allowing them to "pick and choose" intercarrier compensation schemes depending on the nature of the traffic exchanged would have the identical

---

[14/] *See Texas Savings and Community Bankers Ass'n v. Federal Housing Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001) (prior notice and comment unnecessary because the new program is entirely voluntary and leaves parties with the same discretion they had before the change).

[15/] *Order* at ¶ 89.

effect. Similarly, Choctaw's complaint that the mirroring rule results in a unilateral revision of existing wireless carrier-ILEC interconnection agreements rings hollow because the Petitioners ignore that the ISP rate caps have the same potential impact on their agreements with CLECs.[17/] More importantly, in either case, ILECs -- not CLECs or CMRS providers -- control whether there will be any changes to negotiated agreements and, therefore, ILECs should not be heard to complain when the changes actually occur.

Nor is there any basis for Choctaw's assertion that the mirroring rule unlawfully interferes with states' jurisdiction over reciprocal compensation rates.[18/] The Supreme Court has explicitly held that the Commission has jurisdiction to determine proxy rates and establish pricing regimes for all traffic subject to Sections 251 and 252 of the Act.[19/] Moreover, even if there is some question about the Commission's authority to set rates for wireline-wireline traffic, Section 332(c) clearly gives the Commission jurisdiction over LEC-CMRS interconnection.[20/] Although in 1996 the Commission decided to apply Sections 251 and 252 to reciprocal compensation for LEC-CMRS traffic termination, it made clear that it was not rejecting Section 332 as an independent basis for jurisdiction.[21/] As the Commission points out in the *NPRM*, if

---

16/ *See* Choctaw Petition at 5.

17/ *See id.* at 6-7.

18/ *Id.* at 4-5.

19/ AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 385 (1999).

20/ 47 U.S.C. § 332(c). While the *Order* refers to all 251(b)(5) traffic in connection with the mirroring rule, it acknowledges that the rule is intended to apply primarily in the wireless-ILEC context because ILECs "are net recipients of reciprocal compensation from wireless carriers." *Order* at n.176. The traffic balance -- and thus the flow of compensation -- generally is reversed in the ILEC-CLEC context.

21/ *Implemenation of the Local Competition Provisions in the Teleocmmuniations Act of 1996*, First Report and Order 11 FCC Red. 15499, 16005-06 ¶¶ 1204-1205 (1966) ("*Local Competition Order*").

the regulatory scheme established by Sections 251 and 252 "[does] not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on just, reasonable, and nondiscriminatory terms and conditions," the Commission has reserved the right to invoke jurisdiction under Section 332.[22/] Therefore, even if the Commission is precluded under Sections 251 and 252 from subjecting ILECs to the same rules when they are net payees as when they are net payors, the Commission has every right to ensure that its reciprocal compensation regime is fair and rational under Section 332.

CONCLUSION

For the foregoing reasons, the Commission should deny the Petitions and retain the mirroring rule adopted in the *Order*.

Respectfully submitted,

AT&T Wireless Services, Inc.

Howard S. Symons
Sara F. Leibman
Susan McDonald
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, NW-Ste 900
Washington, D.C. 20004
202/434-7300

Of Counsel

Douglas I. Brandon
Douglas I. Brandon
Vice President – External Affairs
1150 Connecticut Avenue, NW - Suite 400
Washington, DC 20036
202/223-9222

July 23, 2001

CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on this 23rd day of July 2001, I caused copies of the foregoing "Opposition of AT&T Wireless Services Inc." to be sent to the following by either first class mail, postage prepaid, or by hand delivery (*):

22/ *NPRM* at ¶ 81, *citing Local Competition Order* at 16006 ¶ 1025.

Stephen G. Kraskin
Kraskin, Lesse & Cosson, LLP
Attorney for the Independent Alliance
on Inter-Carrier Corporation
2120 L Street, N.W., Suite 520
Washington, D.C. 20037

Gail C. Malloy
National Telephone Cooperative
Association
4121 Wilson Boulevard, Tenth Floor
Arlington, VA 22203-1801

Benjamin H. Dickens, Jr.
Blooston, Mordkofsky, Dickens
Duffy & Prendergast
Attorney for Choctaw Telephone
Company et al.
2120 L Street, N.W., Suite 300
Washington, D.C. 20037

Paul Moon*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jane Jackson*
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Tamara Preiss*
Common Carrier Bureau
Competitive Pricing Division
Federal Communications Commission
445 12th Street, S.W., Room 5-A232
Washington, D.C. 20554

James Schlichting*
Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen O'Brien Ham*
Deputy Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

ITS*
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Michelle Mundt
Michelle Mundt

WDC 218448v1